No. 15,456

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH L. JOY, Trustee of the Estate of Miller Scraper & Mfg. Co., Inc., Bankrupt,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION and CONSOLIDATED DISTRIBUTORS, INC., a corporation,

Appellees.

BRIEF OF APPELLEE CONSOLIDATED DISTRIBUTORS, INC.

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BRIEF OF APPELLEE CONSOLIDATED DISTRIBUTORS, INC.

I.

STATEMENT OF JURISDICTION.

This is an appeal by the Trustee in Bankruptcy from an order of the District Judge reversing, in part, an order made by the Referee in Bankruptcy determining the nature, extent and validity of liens claimed by the Bank of America upon certain earth-moving machinery under statutory trust receipts. This

court has jurisdiction under the provisions of 11 U.S.C.A., Section 47, Subsection a., and General Orders in Bankruptcy 36 and 37, 11 U.S.C.A. following Section 53. The amount in controversy exceeds $500.00.

II.

STATEMENT OF QUESTION PRESENTED.

The ultimate question presented by this appellate proceeding is solely whether the provisions of Section 3440 of the California Civil Code, requiring a sale of personalty to be accompanied by an actual and continued change of possession of the personal property sold, operates to invalidate trust receipt security transactions which are carried out in conformity with the Uniform Trust Receipts Law.

III.

SUMMARY STATEMENT OF FACTS.

The principal parties, business entities and personalities identified with these proceedings are as follows:

That Miller Scraper & Mfg. Co., Inc., a corporation, is successor to Kenneth L. Miller, an individual doing business as Miller Scraper Co. (both of said business entities being hereinafter sometimes referred to as "Miller"); that at all times Miller was engaged in the business of manufacturing and selling heavy-duty earth moving equipment, termed "scrapers", and cer-

tain farm equipment, having its factory and principal office located near Selma, in Fresno County (Tr., p. 78); that Consolidated Distributors, Inc., a corporation (hereinafter sometimes referred to as "Consolidated") is a California corporation organized for the specific purpose of acting as the dealer and market distributor of all scrapers manufactured by Miller; that Miller was adjudicated a bankrupt in August 1954; that Bank of America N. T. & S. A. is a national banking association in the position of lender (termed "entruster" under the Uniform Trust Receipts Act) of moneys to Consolidated Distributors, Inc., (termed "trustee" under the Uniform Trust Receipts Act) under statutory trust receipts method of inventory financing; and that Joseph L. Joy is trustee for Miller in bankruptcy.

The facts of this case are largely undisputed. Miller's manufacturing operations were carried on in a moderate-sized sheet metal building situated near the northwestern corner of a four-acre tract of land, which was on the southeast corner of the intersection of Manning Avenue and United States Highway 99 in Fresno County (Tr., pp. 78-85); that by a written agreement dated March 20, 1952 amended in writing on April 4, 1952, Miller and Consolidated agreed that Consolidated would purchase all of Miller's scraper production, agreeing "to accept all production upon completion at the yard of the manufacturing plant" (Tr., p. 194); that deliveries of scrapers by Miller to Consolidated began about April 1, 1952; that, as Miller employees pulled each scraper out of Miller's painting shed,

where it had been painted as the last step in its manufacture, it was unhooked-from upon Consolidated's storage lot of approximately one acre in size, which comprised the southeast corner of the four-acre tract of land owned by Miller (Tr., pp. 85-86); that, by the further terms of the written agreement of March 20, 1952, as amended, all scrapers so delivered by Miller, and accepted by Consolidated, were to be "stored and/or warehoused at the yard of the manufacturer at the direction of the distributor" (Tr., p. 207); that the written agreements set forth the full legal description of the Miller premises and were both immediately recorded in the public records of Fresno County; that the one-acre storage area was leveled and filled, and kept free of weed growth, providing a distinctive area for Consolidated's storage of scrapers (Tr., p. 181); that the various models of scrapers were extremely bulky, varying from two tons to nine and one-half tons in weight, from seven feet to eleven feet in width, and from five feet to eight feet in height (Tr., pp. 94-98); that Paragraph 3 of said written agreements, as amended, provided that Consolidated would cause Miller to be paid on the 1st and 15th of each month for all scrapers "appropriated" to this contract during the preceding bi-monthly period of time; that as each scraper was parked in the Consolidated storage area, each scraper was immediately inspected by Consolidated employees, who either accepted or rejected it, depending on whether any mechanical defects were discovered; that, if accepted, the Consolidated employee listed the scraper by model, serial

number, etc., on a statutory form of trust receipt (Tr., pp. 87-97); that invoices, in the nature of bills of sale, made out to Bank of America were received by Consolidated from Miller about the 1st and 15th of each month, upon which were listed and itemized the scrapers produced and delivered by Miller during the preceding 15-day period; that, as soon as the invoices were received, they were attached by Consolidated to the corresponding trust receipt documents and taken by Consolidated to the Selma Branch of the Bank of America; that immediately upon delivery of the trust receipts to the bank, Miller's account at that bank was credited with a sum equal to 90 per cent of the invoice price of each scraper listed upon the said trust receipts; that Consolidated thereafter sold the scrapers in regular course of business, upon notice to the bank, and accounted to the bank for the proceeds of any sale pursuant to the terms of the trust receipts (Tr., pp. 91-92); that the remaining 10 per cent of the invoice price was immediately paid by Consolidated to Miller, in cash; that the bank and Consolidated properly filed the required statutory notice of trust receipts financing; that every one of the forty-two scrapers involved in this proceeding, which remained unsold at the time Miller was adjudged a bankrupt in August 1954, had been so produced, accepted, and placed on trust receipt financing prior to March 31, 1953; that in 1953 Miller defaulted in the payment of certain moneys loaned by Consolidated to Miller, resulting in several actions at law by Consolidated against Miller for collection of accounts; that by writ-

ten agreement dated December 23, 1953, these accounts were settled, and Miller agreed to sell the remaining scrapers upon Consolidated's storage area at Miller's expense and to account for the proceeds of sale; that all of the said scrapers were at that time on the Consolidated storage lot, and remained there until moved therefrom slightly to the westward by Miller employees during July, 1954, approximately one month prior to Miller's adjudication in bankruptcy; *and that the sum of $43,884.00 has been paid by the bank and by Consolidated to Miller on account of the forty-two scrapers with which these proceedings are concerned, prior to Miller's adjudication in bankruptcy,* being $39,496.00 (90 per cent of the invoice prices) credited to Miller's account at the Selma Branch of the Bank of America from the said bank upon the statutory form of trust receipt, and $4,388.00 (10 per cent of the invoice prices) paid directly in cash by Consolidated to Miller (Tr., p. 182).

IV.

THE DISTRICT COURT JUDGE PROPERLY RULED THE REFEREE TO BE IN ERROR IN DECREEING THAT THE TRUST RECEIPTS WERE INVALID, OR THAT THE ENTRUSTER BANK WAS ESTOPPED FROM ASSERTING THEIR VALIDITY.

This matter was first heard before the Referee in Bankruptcy upon orders to show cause directed at the Bank of America N. T. & S. A. and to Consolidated Distributors, Inc., directing those appellees to show cause respecting the nature, extent and validity of liens. The Referee's order decreeing that both the

bank and Consolidated had no interest in the scrapers (Tr., p. 11), was reversed in part by the District Judge upon review, who ruled that the bank's trust receipts constituted valid liens as a matter of law (Tr., p. 32), notwithstanding the Referee's finding that the sales transaction from the bankrupt (Miller Scraper & Mfg. Co., Inc.,) to Consolidated was not in compliance with Section 3440 of the California Civil Code.

This appeal involves a consideration of two unrelated statutory subjects: (a) Questions relating to a proper interpretation of Civil Code Section 3440 under the facts of this case, and (b) Questions relating to the trust receipts method of financing employed in this case.

(a) Section 3440 Should Be Construed by the Courts to Produce a Just and Fair Result, in Harmony With Established Commercial Practices and With Other Legislation, Including the Uniform Trust Receipts Law.

The material portion of Section 3440, California Civil Code, reads as follows:

> "*Conclusive presumption of fraud.* Every transfer of personal property and every lien on personal property made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery followed by an actual and continued change of possession of the things transferred, is conclusively presumed fraudulent and void as against the transferor's creditors while he remains in possession and the successors in interest of those creditors, and as against any person on whom the transferor's estate devolves in trust for the

benefit of others than the transferor and as against purchasers or encumbrancers in good faith subsequent to the transfer."

California Section 3440 was taken verbatim from Section 36 of the Personal Property Law of New York, and was in turn subsequently copied by the statute makers of Montana, Nevada, North Dakota, Oklahoma, and South Dakota. A noted authority who authored our Uniform Sales Act, *Williston on Sales,* (Second Edition, 1948), Chapter XV, Sections 349-404, pages 351-502, has collected the case law of every state in the union on this topic and his work contains a valuable discussion of the history of the section. According to Professor Williston, the doctrine of Section 3440 that a sale without delivery and an actual and continued change of possession is fraudulent has its historical origin in *Twyne's Case,* 3 Coke, 80 B, 76 Eng. Rep. 809 (Star Chamber, 1601) decided by the Court of the Star Chamber in 1601 at a time when the medieval lawyers were still concerned with *seisin* of chattels and did not recognize as valid any sale unaccompanied by both *delivery* (transfer of seisin) and *payment* of the price. *Slade's Case,* decided a year later in 1602, is the first case in which the validity of an "executory" sale was recognized and assumpsit was allowed for the price. The facts of *Twyne's Case* were that a seller of sheep was allowed by the buyer to remain in possession of the sheep, and he subsequently sold the sheep again to a second buyer, who obtained delivery. The court *held* the second buyer must prevail over the first, who had also paid for the

sheep. The court mentioned the statute of 13 Eliz., C. 5, 1570, sec. 2, enacted some 50 years earlier, which declared that transfers in *actual* fraud of creditors were void and which is the ancestor of our modern statutes on that topic. But the court in *Twyne's Case* obviously did not base its decision upon a finding of actual fraud, for the controversy was between an earlier and later buyer of the same goods rather than between seller and buyer, but instead was based upon the doctrines that there could be no sale (passage of title) without delivery. The subsequent rapid evolution of English law, permitting transfers of title unaccompanied by either delivery or payment of the price, led the English lawyers to explain *Twyne's Case* as a reflection of a policy of the Statute of 13 Elizabeth, and invited a misapplication of the rule of *Twyne's Case* from the two-purchasers situation to a seller-buyer situation, so that a sale without delivery was by false analogy to actual fraud declared to be *conclusively presumed* to be fraudulent as to the seller's creditors. The harshness of this rule led to its rapid evolution, so that it was soon declared to be only *prima facie* fraudulent, and by 1844 in England a sale without delivery gave rise to only an inference of fraud.

Only a handful of American states, of which California is one, have present-day statutes embodying the "conclusive presumption" of fraud language of the rule of *Twyne's Case,* and Professor Williston, and others, have suggested that such statutes can be made workable in practice only by construing them in

a reasonable way. Section 25 of the Uniform Sales Act, which is our Civil Code Section 1745, is our modern statutory statement of the problem of successive purchasers with the later purchaser getting possession in good faith. *In 1911, when the Uniform Sales Act was enacted in New York, the legislature at the same time repealed the law from which our Section 3440 was copied.* Of course, our legislature has not repealed our statute, but it seems to Appellee that the circumstance of its repeal by the great commercial state of New York, by virtue of its enactment of Section 25 of the Sales Act, is persuasive evidence of the fact that Section 25 of the Sales Act (California Civil Code, Section 1745) is perfectly adapted to perform the function that our Section 3440 is less perfectly designed to do, and that the harshness of this medieval statute should and must be applied with reason and caution, rather than narrowly and technically.

There can be no question upon the admitted facts of this case that there was an "immediate delivery" of the individual scrapers with which we are here concerned, for there can be no question that the scrapers were delivered by Miller to Consolidated as fully, completely and immediately as chattels of their size and bulk were capable. In *Shepherd v. Gamble,* 95 C.A. 2d 890 (1950), where "the question for decision is whether the transfer of a huge tractor was void under Section 3440 of the Civil Code by reason of the circumstances proved with respect to its delivery," the court held that "where a moveable is bulky and not readily transferable by manual delivery the rule of

that section is relaxed by reason of the impracticability of actual delivery by ordinary means and methods (citing cases)." This is equivalent to saying that the "delivery" required by statute is that kind of physical handing over which is reasonably possible under the circumstances.

The facts found by the Referee with respect to the issue of delivery and change of possession in this case, which were adopted by the District Judge as the findings of that court upon review, do not contain any finding that there was no delivery of the scrapers in question. The Referee's stated conclusions of law are "that there was no immediate or continued change of possession of said scrapers . . . as required by Section 3440 . . ." (Tr., p. 16). Nor does the Referee state any conclusion that delivery was not accompanied by an actual change of possession. The sole conclusion of law which the Referee made as the basis for his order was that delivery was not followed by a "continued" change of possession.

The standard of reasonableness of interpretation required in connection with the facts of particular cases is demonstrated in *Porter v. Bucher,* 98 Cal. 454 (1893), where the question involved the construction of the statutory requirement of continued change of possession. In the *Porter* case a man and his wife carried on cattle feeding operations on their farm, and the husband sold 120 tons of hay stacked thereon to his wife. The hay remained in its original location beside the corrals. Then, the husband having filed a petition in insolvency, his trustee sought to replevy

the hay from the wife because of alleged non-compliance with Section 3440. The court instructed the jury that as a matter of law the sale was void. In reversing the judgment for this error in instruction, the California Supreme Court said:

> "The expression, 'an actual and continued change of possession,' was construed in *Stevens v. Irwin,* 15 Cal. 503. It was there said: 'The word "actual" was designed to exclude the idea of a mere formal change of possession, and the word "continued" to exclude the idea of a mere temporary change; *but it never was the design of the statute to give such extension of meaning to this phrase, "continued change of possession," as to require, upon a penalty of the forfeiture of the goods, that the vendor should never have any control over or use of them. This construction, if made without exception, would lead to very unjust and very absurd results.*'" (Page 459) (Emphasis added.)

The court in the *Porter* case, noting that the parties (husband and wife) had been in the hay and cattle business for some years, buying and selling hay and feeding it at the stacks, considered the good faith commercial relationship evidenced by the facts of the case as being of extreme importance with respect to the construction to be given to Section 3440, stating that,

> "The Code provides no different rule as to the formality of such transaction between husband and wife, from that required between strangers; yet the law, *giving a reasonable construction to all such statutes,* takes into consideration not only

> the character of the property, but the relations of the parties and the use of the property intended, and *only requires that which would naturally be done in an honest and business-like transaction where there was no thought of fraud or concealment.*" (Page 460) (Emphasis added.)

And in the recent case of *Shepherd v. Gamble,* reported at 95 C.A. 2d 893 (1950), (being a second case of the same name, in addition to the case hereinabove cited and discussed), both the seller and the buyer of a truck were landscape gardners, with the seller living in the main house while the buyer lived in a small house in the rear on the same parcel of residential property. Both conducted their businesses out of their respective homes. There were no signs on the truck to indicate a change of ownership, and after an absence of only two months the buyer brought the truck back to the seller's premises, where the buyer also resumed his residence, and the truck was used by buyer and parked on the premises for the next seven months. Then, before departing from the state for a five months' absence, *the buyer turned possession of the truck back to the seller under an arrangement whereby the former owner would use it in his business* in return for keeping up the buyer's payments to the finance company. During the new owner's absence the truck was levied upon by a creditor of the former owner. The decision applauds the trial court's determination that there was a sufficient "actual and continued change of possession" to satisfy the statute, with these words:

> "To hold that such a transaction as that found by the court is conclusively presumed to be fraudulent *would virtually prohibit valid sales or exchanges of moveables between parties residing at and working out of the same premises.* The Legislature could not reasonably have intended such iniquitious consequences." (Page 895) (Emphasis added).

The above cases, and many others which could be cited, illustrate the common sense approach which our courts have taken in constructing Section 3440 in commercial transactions. It is unthinkable that a statute of such importance to modern commercial relationships should be applied either narrowly or technically. It has been held in *Weil v. Paul,* 22 Cal. 492 (1863), and in *Southern California Collection Co. v. Napkie,* 106 C.A. 2d 565 (1951), that where there are no disputed material facts the question of compliance or non-compliance with Section 3440 is a question of law to be determined by the court. General Order in Bankruptcy No. 47 states that the Judge, upon review, shall accept the Referee's finding of fact unless clearly erroneous but pointedly omits any requirement that the Referee's conclusions of law must be accepted by the court. The Referee's order which decreed a forfeiture of the purchase price paid for these scrapers and received by the bankrupt prior to bankruptcy, and which also struck down the bank's lien for payment of its loan upon the scrapers was, in these circumstances, a grossly inequitable and absurd result which the District Court Judge properly

orrected in his order appealed from in these pro-eedings.

b) The Bank's Security Interest Under Its Trust Receipts Was Valid, for Section 3440 Has No Relevancy to Trust Receipts Transactions.

Consolidated and the bank have a community of nterest on this appeal in the question of the validity of the trust receipts in that the scrapers have so leclined in value because of their long exposure to vind, rain and sun in their place of storage that the 0 per cent ($4,388.00) equity that Consolidated for-nerly had in the scrapers as new machines has been viped out. For this reason Consolidated did not ap-peal from that portion of the Judge's order appealed from in these proceedings which adopted the Referee's indings of fact upon the issue of compliance or non-compliance with Section 3440 as far as a sales ransaction between a seller (Miller) and a buyer (Consolidated) is concerned, for Consolidated is of the opinion that the Judge's decision that Section 3440 has no relevancy to the trust receipts with which we are concerned in this case was entirely correct and should be sustained as being decisive of all ques-tions presented on this appeal.

The Uniform Trust Receipts Law was enacted in California in 1935 as Sections 3012 to 3016.16 of the Civil Code. *The stated purpose of the new legislation was to bring our California law into uniformity with the laws of other states which enact it.* Through the present time twenty-nine of our states and territories have enacted this uniform act.

The appellant contends in his opening brief that the District Judge erred in reversing that portion of the Referee's order relating to estoppel. The Referee's conclusions of law on this point state only: ". . . that since the Bank of America N. T. & S. A. was aware at all times of the facts concerning said lack of change of possession, said Bank of America N. T. & S. A. is estopped from claiming any better title than was obtained by Consolidated Distributors, Inc.; and that by reason of said lack of change of possession, said purported sale from the above bankrupt to Consolidated Distributors, Inc., was and is, void." (Tr., p. 16).

It is difficult to analyze precisely what this ambiguous statement means, but among its possible implications are (1) that the trust receipts were invalid because of an alleged lack of delivery followed by an actual and continued change of possession of the scrapers within the purview of Section 3440, and/or (2) that granting that the trust receipts were valid, the Bank of America was by some act of commission or omission estopped from asserting the validity of its lien acquired thereby.

Turning now to a consideration of the first stated proposition, that the trust receipts were invalid because of alleged non-compliance with Section 3440, the question is emphatically answered in the negative in the *Chichester* case (*Chichester v. Commercial Credit Co.,* 37 C.A. 2d 439 (1940)), which is a leading case in this state construing the Uniform Trust Receipts Law.

In the *Chichester* case a certain Reagan, doing business both individually and as a corporation as a Los Angeles Chrysler and Plymouth auto dealer, obtained financing from the defendant Commercial Credit Co. and purchased new cars for resale from the Chrysler Corporation factory. On pages 441 and 442 of the report we read that—

> "Under the procedure adopted in the purchase of the automobiles in question whenever Reagan wished to obtain Plymouth automobiles, he went to the office of the defendant and signed trust receipts for the cars which he desired to purchase, together with promissory notes in the same amounts as the trust receipts. Thereafter, defendant called the Los Angeles office of the Chrysler Corporation and ordered the automobiles delivered to Reagan's place of business. In the case of the purchase of Chrysler automobiles, Reagan placed the order with the Chrysler Corporation in Detroit, Michigan, and after payment of the purchase price by defendant, the automobiles were shipped to Reagan but the bills of lading were made out to, and sent directly to defendant. After Reagan had signed trust receipts for the automobiles, together with promissory notes in the same amounts as the trust receipts, defendant delivered the bills of lading to Reagan and the latter took delivery of the automobiles."

The automobiles in question in the *Chichester* case were in Reagan's showrooms at the time he and his corporation filed in bankruptcy. When the defendant credit company took possession of the cars under the

terms of the trust receipt Reagan's trustee in bankruptcy brought an action for conversion. A proper statement of trust receipts financing had been filed with the Secretary of State in accordance with the provisions of Section 3016.9 of the Civil Code. The complaint alleged three causes of action, the third alleging that the transfer of the cars from the Chrysler Corporation to Reagan was void because of failure to comply with the provisions of Section 3440 of the Civil Code. Judgment was for defendant, and an appeal was taken.

The court noted that the very first requirement of Section 3440 is *delivery,* and that there was no delivery of any of the cars until after the trust receipts were signed. Moreover, unlike the case at bar, no documents of title were delivered to the bank until *after* the trust receipts were executed and delivered.

> "The bills of lading were not delivered to Reagan until after the trust receipts had been signed. Concerning the Plymouth automobiles which were delivered from the Los Angeles office of the Chrysler Corporation, defendant after securing trust receipts from Reagan, ordered the cars to be delivered to Reagan's place of business and paid the purchase price directly to the corporation. *There is no evidence whatever tending to prove that Reagan at any time prior to signing the trust receipts, had either title to or possession of any of the automobiles in question.*" (Page 444) (Emphasis added).

But the court *held* that the trust receipts were valid, notwithstanding there was neither a sale nor delivery

prior to their execution. To the argument that this construction of the Uniform Trust Receipts Law had the practical effect of repealing Section 3440, the court stated it was not impressed with the argument for the reason that ". . . trust receipts constitute the only type of security interest which is not governed by the same laws that existed prior to the enactment of the legislation in question" (Trust Receipts Act), and further—

> "The act itself enjoins us to so interpret and construe the act 'as to effectuate its general purpose to make uniform the law of the states which enact it'. (Civil Code Section 3016.14.) This rule of construction has for its purpose the object of unifying the laws of the several states on the same subject and is therefore not to be treated as a codification of local laws or commercial customs. *The fundamental purpose of the act in question should be considered in the light of the general commercial law of the country as a whole. 'The principle of the uniform act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it.'* (*Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co.,* 239 U.S. 520, 528 (36 Sup. Ct. 194, 197, 60 L. Ed. 417).)" (Page 448) (Emphasis added).

The same argument that Section 3440 is applicable to a trust receipts situation had been previously rejected by our Federal Courts in California in *In re Boswell,* 20 F. Supp. 748 (1937). In that case the Referee had ruled that the new law was violative of our state constitution. District Judge McCormick, in

his opinion, noted that the counsel for the trustee in bankruptcy dwelt at length in briefs and in oral argument upon the complexities of the new law and upon the "grave changes" that it introduced into the statutory commercial credit methods of this state. And the counsel must have argued that the newly-enacted Uniform Trust Receipts Act validated security transactions unaccompanied by delivery or change of possession, thereby limiting the operation and scope of Section 3440, for the court's opinion adverts to the statutory language of Section 3440 in the following statement:

> "Trust receipts have long been independent security devices employed in commercial credit transactions. (*In re Cattus* (C.C.A. 2, 1910) 183 F. 733.
>
> Their use has become greatly extended in the United States since the automobile has assumed its nationwide and popular proportions in financing and credit requirements for this major industry. *In re Bell Motor Co.* (C.C.A. 8) 45 F. (2d) 19. So that today these mercantile mediums, because of their beneficial features in quick credit transactions and their frequent judicial concern, have become thoroughly established and identified in business and law. When the term 'Trust Receipt' is used in commerce, the credit and financial agencies of present-day activities associate it with a security instrumentality that resembles a pledge, a chattel mortgage, or a conditional sale contract, but which is exactly none of these mediums of trade and credit. It is a transaction germane to these instrumentalities because it is like them, closely allied and related to them. Some

chief differences that readily enter the mind when the term is used *include the absence of actual or immediate delivery or change of possession,* the removal of notice, recordation or verification requirements, and the *retention of title in the vendor.*

The respondent trustee in bankruptcy eloquently animadverts that nowhere in the title to the questioned 'Trust Receipts Law' is there any intimation that the Legislature intended to 'tinker with the salutory provisions regarding chattel mortgages, their recordation, *or sales,* or assignment of merchandise in bulk * * * or conferring on merchants the right to mortgage their entire stock in trade secretly and without notice whatsoever, unless wholesalers maintain a Bureau at Sacramento to keep a daily check on the office of the Secretary of State.'

But we think that mentioning the general and commercially understood subject of 'Trust Receipts' in the title connotes and suggests fields of state legislation concerning the requirements of valid chattel mortgages as against third parties and creditors, *delivery and possession necessities under laws relating to personal property,* and the title expressly states that the statute is aimed at 'Trust Receipts and pledges of personal property unaccompanied by possession in the pledgee.' This terminology, in the light of historical efforts of financial and mercantile agencies in different states to remove conflicts and complications in the commercial law of the country, is a reasonably intelligent reference to *changes* that are found in the text of the 'Uniform Trust Receipts Law.' '' (Pages 751-752) (Emphasis added.)

Appellee believes that Judge McCormick clearly indicates, in the above-quoted portion of his opinion that the new act effected a marked change in the previously existing law, insofar as it concerned the effect of the language of Section 3440 respecting delivery or change of possession of the chattels covered by a trust receipt transaction.

The Law itself, in Section 3016.13, clearly implies that the provisions of the Uniform Trusts Receipts Law embody a change in the ancient rules relating to delivery of possession in situations to which the Law applies. Section 3016.13 reads as follows:

> "Section 3016.13. *Cases not provided for.* In any case not provided for in this chapter the rules of law and equity, including the law merchant shall continue to apply to trust receipt transactions and purported pledge transactions *not accompanied by delivery of possession.* (Added Stats. 1935, c. 716, p. 1939, Sec. 1.)" (Emphasis added.)

The foregoing case of *In re Boswell* (affirmed 9 Fed. 2d 239) is a leading case, frequently cited a definitive. Volume 89 of *Corpus Juris Secundum,* published in 1955, carries Judge McCormick's languag into the body of the text of the article on *Trust Receipts* citing the *Boswell* case as footnote authority as follows:

> "As used in commerce by credit and financia agencies it is regarded as a security instrumentality which resembles a pledge, a chattel mortgage or a conditional sales contract, but is exactly non

of these mediums of trade and credit. Some of the chief differences are the absence of actual or immediate delivery, or change of possession, the removal of notice, recordation or verification requirements, and the retention of title in the vendor." (89 C.J.S. 697.)

It need hardly be noted that the Trustee in Bankruptcy does not claim that the trust receipts in the present case are invalid because of any failure to follow the statutory method of trust receipts financing.

The trust receipts in this case were executed in a proper and usual manner by a dealer (Consolidated), termed a "trustee" under the Act, to secure repayment by the trustee of money loaned to the trustee by the lending institution (Bank of America), as "entruster," which money enabled the trustee to pay for the scrapers purchased from the manufacturer (Miller). Compare *Commercial Discount Co. v. Los Angeles,* 16 Cal. 2d 158 (1940). The entruster has a "mercantile" title, something more than the commonly understood concept of security title, since the entruster can repossess the goods at will under a trust receipt whether the trustee is in default or not.

A frequent source of confusion concerning the source and nature of the entruster's title arises from the unfortunate currency of the word "trustee" as used in trust receipts financing. By well-known and understood principles of equity law a "trustee" is a holder of legal title for the benefit of another, but Section 3014 of the Civil Code specifically states among other things, in defining the word "trustee" as

used in the Uniform Act, that the use of that word in the Act "shall not be interpreted or construed to imply the existence of a trust or any right or duty of a trustee in the sense of equity jurisprudence . . ."

It is apparent that the keystone of appellant's argument on this appeal on the trust receipts question is that the security interest of the entruster Bank of America is a "derivative title" from the trustee (Consolidated). On page 10 of appellant's opening brief, counsel for appellant states his prime argument that "Since a trust receipt is similar to a chattel mortgage in that a security interest is transferred for the purpose of securing an obligation to repay money the general rule relating to the requirement that the validity of a mortgage must depend on the validity of the title of the mortgagor also applies with respect to the necessity of the valid title being vested in the owner of property upon which it executes a trust receipt . . .", and appellant goes on to state his reliance upon the general rule that a mortgagee gets no better title than his mortgagor had. Based upon this false premise of the nature of the security interest of the entruster in this case, the argument of the appellant Trustee in Bankruptcy then proceeds that a failure to comply with Section 3440 voids the trustee's (Consolidated's) title to the goods sold and that the entruster's (bank's) title is thus also voided because dependent upon Consolidated's title.

Prior to the adoption of the Uniform Trust Receipts Law in California, it was held in *Arena v. Bank of Italy,* 194 Cal. 195 (1924), that if the entruster's

ecurity interest is derived from the trustee the transction was a chattel mortgage and not a true trust reeipt transaction, and was void as to the creditors of ne "mortgagor" in the absence of recordation of ne instrument. But the changes effected by the trust eceipts law upon this stated doctrine of the *Arena* ase were stated thusly by the court in the *Chichester* ase, cited above, as follows:

"Plaintiff places great reliance upon the case of *Arena v. Bank of Italy,* supra, in support of his contention that a trust receipt which does not comply with the provisions of section 3440 of the Civil Code is void as against creditors of the trustee. That decision, however, is clearly distinguishable upon its facts from the instant case. *It must be borne in mind that the Arena case was decided long prior to the enactment of the Uniform Trust Receipts Law.* In the *Arena* case, one Dellaira having both the title and possession of certain goods, assigned and delivered possession of such goods to the Bank of Italy as security for an indebtedness; thereafter the bank restored the possession of such goods to Dellaira and, at the same time took the trust receipts in question from Dellaira. Obviously, whatever title or interest the bank acquired could only have been derived from Dellaira, the trustee under the trust receipts. The court properly held that *under the law which existed at that time, i.e., prior to the enactment of the Uniform Trust Receipts Law,* the transaction was to be treated as being in the nature of a chattel mortgage and consequently void as against the trustee's (debtor's) creditors unless properly recorded.

> From the foregoing discussion it appears tha
> *under the former law the source of the entruster*
> *title was the controlling factor in determinin*
> *whether or not a given trust receipt transactio*
> *was valid. However, under the existing law, b*
> *which the instant case is to be governed, the en*
> *truster's security interest will be protecte*
> *whether his title is derived from the trustee o*
> *from a third party.* From an examination of se
> tion 3014 of the Civil Code, which defines trust r
> ceipts transactions, it is apparent that the legi
> lature intended to include within the general pr
> visions of the law all trust receipt transactio
> without regard to the source of the entruster
> title. That section provides, among other things
> 'The security interest of the entruster may be d
> rived from the trustee or from any other perso
> and by pledge or by transfer of title or othe
> wise.' " (Pages 444-445.) (Emphasis added.)
>
> ". . . Such was the holding in the case of *In r*
> *Boswell,* supra, wherein a type of security in
> strument, identical with that of the *Arena* cas
> was held to be valid under the Uniform Tru
> Receipts Law." (Page 447.)

Counsel for appellant Trustee in Bankruptcy, o
pages 16 through 25, has attempted to distinguish th
Chichester case from the case at bar primarily on th
ground it is the seller (Miller) who is bankrupt he
rather than the buyer (Reagan) who was adjudicate
bankrupt in the *Chichester* case. On page 19 of appe
lant's opening brief counsel objects to applying th
rule of the *Chichester* case "as an abstract rule o
law", and on page 20 of his brief counsel for a

ellant makes the flat statement that Civil Code Sec-
on 3014 (which provides that the security interest
f the entruster may be derived from the trustee or
om any other person) applies only in a "normal"
ust receipt transaction where Section 3440 has been
mplied with. Counsel has cited no cases from
alifornia or from any other jurisdiction which has
acted the Uniform Trust Receipts Law, or other-
ise, to illustrate or to support this asserted rule of
w. The court found in the *Chichester* case that Rea-
an had neither title nor possession of the cars before
elivery of any of the warehouse receipts, and still
ie court held the trust receipts were valid. The
rime purpose of the Uniform Trust Receipts Act is
validate trust receipts and to thus foster the com-
ercial usages of the country by protecting the lend-
's (entruster's) security interests. And it makes no
ifference in the fulfillment of this objective whether
is the buyer (trustee) or the seller of the goods who
ecomes bankrupt. The *Chichester* case, then, cannot
e thus distinguished from the present case. In addi-
on to the fact that the law (Civil Code Section 3014)
ow expressly states the source of the entruster's title
be immaterial, and therefore not subject to attack
ecause of any weakness or infirmity in a claimed
ain of title, is the plain fact that in the present
se the entruster's title comes directly from the seller
Miller) by virtue of delivery to it of the bills of sale
ttached to the trust receipts wherein the bank, and
ot Consolidated, is named as transferee. Thus, in
oth law and fact, the entruster's title is here not
erivative.

As the court in the *Chichester* case said, in com menting upon the security interest of the entruster i a trust receipt transaction—

> ". . . The security interest of the defendant (e truster) was paramount to the claims *of all othe persons, including the trustee in bankruptcy.* (Page 449) (Emphasis added.)

And Section 3016.3 of the Code specifically stat that if the entruster properly files a statement of tru receipts financing, as provided in the Law, his sec rity interest in the goods "shall be effective *again all persons,*" except as specifically otherwise provide in the Uniform Trust Receipts Law. The provisio of Section 3016.3 encompass *all persons,* as disti guished from only the creditors of the trustee me tioned in Section 3016.4 of the Law.

The cases cited by the Trustee in Bankruptcy o pages 18, 19 and 20 of the Reply Brief, relating to transfer of a voidable title to a bona fide purchas for value, have no relevancy here, because of the fa that the entruster's (Bank of America's) security i terest under the trust receipts is not a derivative tit in any sense of the word, either in law or in fact i this case, and as previously noted the Act expressl states that it does not deal in classical equity concep of title.

(c) No Estoppel Exists Against the Bank Asserting the Validi of Its Trust Receipts.

The last point remaining for discussion is th claimed estoppel against the bank to assert the validit

its lien rights under the trust receipts. The Ref-
ee's conclusions of law contained the statement that
e bank is estopped because it "was aware at all
nes of the facts concerning said lack of change of
ssession." This is apparently based solely upon the
ding that Jess Forrest, the bank manager, allegedly
w on his visits to the premises "that said scrapers
re intermingled with other equipment of the above
nkrupt." This is a reference to the proximity of
nked scrapers and junked orchard heaters and farm
gons belonging to Miller at the time of bankruptcy.
he case of *Ballou v. Andrews Banking Co.,* 128 Cal.
2 (1900), cited and discussed on page 11 of Appel-
t's Opening Brief, and the excerpt from *Brown v.*
nk of Napa, 77 Cal. 544 (1888) appearing on pages
and 13, involved the question of whether the lend-
g agency was a bona fide purchaser for value or had
howledge of the infirmity of title. These cases, and
e others cited by the Trustee in Bankruptcy in his
ief, all relate to the equitable doctrine concerning
e transfer of a voidable title to a bona fide purchaser
r value. It seems rather obvious that these are not
toppel cases, and ought not to be confused with the
ctrine of estoppel. The argument proceeds by false
alogies, and is not relevant to the issue of this case
volving questions of construction of statute law.
he arguments of counsel for appellant Trustee in
ankruptcy concerning the claimed estoppel are all
eply involved with his arguments concerning the
leged derivative title. Appellee believes that any
aim of promissory or equitable estoppel against the

bank is fanciful. The duties of the entruster bar
are prescribed by the Uniform Trust Receipts La
The law provides for a reasonable period of validi
of the entruster's security interest without filing (
days) and affords a convenient manner and place f
thereafter filing a notice of trust receipts financin
The inspections made by Mr. Forrest, the bank ma
ager, were solely for the purpose of identifying t
merchandise with that listed on the trust receipt
and to see that no machine had been disposed
without discharging the lien (Tr., p. 121). *Mr. Fo
rest, on his visits of inspection, observed apparent
normal relationships between Miller and Consolidate
in which everyone was respecting the bank's li
rights under the trust receipts* (Tr., pp. 178-180
There is no evidence or argument here presented th
the bank made any representations, or misrepresent
tions, or that any person was misled thereby. Und
these circumstances the claimed estoppel does n
exist, and certainly the appellant Trustee in Ban
ruptcy has demonstrated neither law nor fact to su
port his argument that the bank is estopped to asse
the validity of the lien of its trust receipts.

V.

CONCLUSION.

That portion of the referee's order decreeing that te bank's trust receipts were invalid, or that the hnk was estopped from asserting their validity, was ontrary to law, upon the authorities hereinabove cted, and Judge Jertberg properly and lawfully excised his authority under General Order in Bankuptcy No. 47 to correct that portion of the Referee's der which was "clearly erroneous." The appellant's tack upon the Judge's order appealed from is based uarely upon the demonstrably false premise that te trust receipts are "void" because allegedly dependent upon the title of Consolidated in the scrapers re in question. The provisions of the Uniform rust Receipts Law, and the decisions of the State d Federal Courts construing that law, cited and scussed in this brief, demonstrate the error of that sic premise. In appellee's view of the case the eferee misconstrued and misapplied Section 3440 of te California Civil Code to reach an "unjust and surd result," in which the scrapers in question ere declared forfeited to the Trustee in Bankruptcy, d forfeiture was also decreed of the sum of $39,-46.00, in cash, paid by the bank to Miller and the rther sum of $4,387.00 in cash paid by Consolidated t Miller. It is submitted that the provisions of Sec-on 3440 of the California Civil Code do not affect te provisions of the Uniform Trust Receipts Law on which appellee relies in these proceedings, and tat the question of the validity of the entruster's

security interest in the scrapers here in question mu
be determined by reference to the law of tru
receipts. It is further submitted that the tru
receipts introduced into evidence in this proceedi
are valid under the Uniform Trust Receipts Law, i
the circumstances of this case, and that no estopp
exists against the Bank of America to assert the
validity. The order of the Honorable Gilbert H. Jer
berg, District Judge, appealed from in these proce
ings, should be affirmed.

Dated, Fresno, California,
September 19, 1957.

Respectfully submitted,

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Consolidated Distributors, In